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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-201

JOHN B. GREEHOLTZ, individually and as Chairman,
Nebraska Board of Parole, EUGENE E. NEAL,
CATHERINE R. DAHLQUIST, MARSHALL M.
TATE and EDWARD M. ROWLEY,

Petitioners,

VERSUS

INMATES OF THE NEBRASKA PENAL AND COR-
RECTIONAL COMPLEX, RICHARD C. WALKER,
WILLIAM RANDOLPH, RICHARD J. LEARY,
ROBERT L. GAMRON, FREDERICK L. GRANT,
WAYNE GOHAM and CHARLES LaPLANTE,

Respondents.

**BRIEF OF THE STATE OF OKLAHOMA
AS AMICUS CURIAE**

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November, 1978

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The Attorney General of Oklahoma, on behalf of the State of Oklahoma and pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States and Rule 29 of the Federal Rules of Civil Procedure, files its brief in the above styled case.

INTEREST OF AMICUS CURIAE

Oklahoma incarcerates individuals convicted of violating the criminal statutes of the State. Subsequent to conviction and incarceration, and prior to the expiration of their sentence, some of those individuals receive paroles from the Governor of Oklahoma on the recommendation of the State Pardon and Parole Board. This process has been the subject of litigation in the United States District Court for the Western District of Oklahoma. The plaintiffs were inmates in the Oklahoma correctional system and the defendants were the members of the Pardon and Parole Board and the Governor. The plaintiffs claimed a violation of their Fourteenth Amendment rights and particularly their right to due process of law as guaranteed by that Amendment. By agreement of the parties, the case was submitted on Motion for Summary Judgment. On April 24, 1978, the District Court entered an order granting judgment for the defendants. An appeal of that order is currently pending in the United States Court of Appeals for the Tenth Circuit.

ARGUMENT

When a challenge to the parole process of a state is predicated on a violation of the due process clause of the Fourteenth Amendment three questions are raised: (1) whether a "liberty interest" significant enough to be entitled to procedural protections, is involved;¹ (2) whether

¹ Because the denial of parole does not involve a deprivation of "life" or "property" only the "liberty" aspect of the Fourteenth Amendment need be discussd.

the deprivation of that interest resulted from state action, and (3) whether the deprivation occurred without the appropriate measure of due process of law required for the particular interest involved. The State of Oklahoma submits that an inmate in a state correctional system has no "liberty interest" at stake in a parole release hearing. Therefore, the last two questions raised above need not be considered.

The initial inquiry is then to determine whether or not a protected interest exists. United States Supreme Court cases defining "liberty interest" have not passed clearly on the issues raised in this appeal. (Compare the discussion of *Escoe v. Zerbst*, 295 U.S. 490 and *Jay v. Boyd*, 351 U.S. 345 in Footnote 3 at page 408 and of *Menechino v. Oswald*, 430 F.2d 403 [2nd Cir. 1970], cert. den. 400 U.S. 1023, 27 L.Ed.2d 635, 91 S.Ct. 558 [1971].) However, those cases are illustrative of the scope of interests encompassed by constitutional "liberty." As used in the Fourteenth Amendment, "liberty" is not subject to precise definition:

"Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Meyer v. Nebraska, 262 U.S. 390, 394, 67 L.Ed.2d 1042, 43 S.Ct. 625 (1922). As noted in *Meyer v. Nebraska*, supra, Fourteenth Amendment "liberty" means bodily restraint

as well as other specifically enumerated aspects of personal liberty. See, *Paul v. Davis*, 424 U.S. 693, 47 L.Ed. 2d 405, 96 S.Ct. 1155 (1976); *Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973); *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 33 L.E.2d 548, 92 S.Ct. 2701 (1972); *Griswald v. Connecticut*, 381 U.S. 479, 14 L. Ed.2d 510, 85 S.Ct. 1678 (1965); *Kent v. Dullus*, 357 U.S. 116, 2 L.Ed.2d 1204, 78 S.Ct. 1113 (1958); *Bolling v. Sharpe*, 347 U.S. 497, 98 L.Ed. 884, 74 S.Ct. 693 (1954). And it is well recognized that:

“The range of interest protected by procedural due process is not infinite.”

Board of Regents v. Roth, supra, at 408 U.S. 570.

However, in this case the Court is asked to extend the cases which have defined the scope of “liberty interest” to include an inmate’s interest in the parole process. To determine the merits of this issue, it is necessary to examine the extent to which an inmate will suffer a “grievous loss” resulting from the denial of clemency. *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 95 L.Ed. 817, 71 S.Ct. 624 (1951) (Frankfurter J. concurring), quoted in *Goldberg v. Kelly*, 397 U.S. 254, 263, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970). It is not purely semantical to argue that an inmate has no liberty interest in parole because its denial results in no “loss,” grievance or otherwise. Until paroled, the status of incarceration is not changed. Consequently, the inmate who has been previously deprived of his liberty with the

full panoply of procedural protections guaranteed by the Due Process Clause “loses” nothing, in the constitutional sense, when clemency is denied. *Brown v. Lundgren*, 528 F.2d 1050 (5th Cir. 1976); *Bradford v. Weinstein*, 519 F.2d 728 (4th Cir. 1974); *Scarpa v. United States Board of Parole*, 477 U.S. 278 (5th Cir. 1973); *Roach v. Board of Pardons and Paroles*, 503 F.2d 1367 (8th Cir. 1974); *Menchino v. Oswald*, 430 F.2d 403 (2nd Cir. 1970). To say that the inmate loses nothing is not to be flippant for certainly each inmate is affected by the decision. However, the United States Constitution does not provide for, nor discuss, parole and though a State is not obligated to provide paroles or other clemency, by doing so, the only constitutionally recognized interest conferred on an inmate prior to the actual decision to grant clemency is the right to be “considered” for parole in conformity with appropriate state statutes.² This is far different from a right to parole itself. *Williams v. Missouri Board of Probation and Parole*, No. 74-CV-125-W-2 (W.D. Mo. 1978), at page 13 of the Opinion. (Because the Constitution does not provide for parole, the source of any “liberty interest” must come from state law. *Wolff, v. McDonnell*, 418 U.S. 539, 556-557, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974); *Meachum v. Fano*, 427 U.S. 215, 225-228, 49 L.Ed.2d 451, 96 S.Ct. 2532 (1976).)

It is, of course, misleading to characterize this argument as one founded on a right/privilege distinction. Oklahoma recognizes that the application of the due process

² In Oklahoma, 57 O.S. 1971 § 332.7 requires that every inmate must be reviewed and considered for parole prior to the expiration of one-third of his sentence.

clause is not determined by resolution of this distinction. *Graham v. Richardson*, 403 U.S. 365, 374, 29 L.Ed.2d 534, 91 S.Ct. 1848 (1971). The foregoing is instead, an analysis of the "nature of the interest" at stake. *Board of Regents v. Roth*, 408 U.S. 564, 570-571, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). And the crucial element of this analysis is not merely the "weight" of an inmate's interest in release on parole but whether the nature of the interest is one within the contemplation of the "liberty" language of the Fourteenth Amendment. *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972). *Morrissey v. Brewer*, supra, 408 U.S. at 481, 33 L.Ed.2d, at 494.

The distinction sought to be drawn by Oklahoma is between the status of an inmate granted clemency and the status of an inmate prior to a decision to grant clemency. The first is a recognizable, constitutionally protected interest to which due process attaches, e.g., parole revocation — *Morrissey v. Brewer*, supra, and of good time credits — *Wolff v. McDonnell*, supra. The second constitutes a mere expectation or hope of achieving a protected status. Oklahoma submits that this distinction is valid and that nowhere in the Constitution or United States Supreme Court cases discussing "liberty" is an interest so ephemeral as this hope of a protected status recognized as a "liberty interest." Supporting this position is this Court's Opinion in *Morrissey v. Brewer*. In discussing the first status mentioned above, this Court wrote:

"[t]hough the state properly subjects him [the parolee] to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison [Footnote 8]." 408 U.S. at 482

Footnote 8 reads as follows:

"[i]t is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom."

U. S., ex rel. Bey v. Connecticut Board of Parole, 443 F.2d 1079, 1086 (C.A. 2 1971). Oklahoma submits that there can be no other significance for the distinction made in *Morrissey v. Brewer*, than to draw the line between when due process is applicable and when it is not.

In addition, in *Morrissey* this Court was faced with determining what procedural protections should attach to a fact-finding hearing, i.e., did the inmate violate his parole. The parole process is clearly distinguishable because the Board cannot determine, as a matter of fact, whether or not an inmate will succeed as a parolee. Consequently, the procedures for insuring a fair fact-finding process are inappropriate where there is no fact capable of determination. (See *Williams v. Missouri Board of Probation and Parole*, supra.)

In addition to *Morrissey v. Brewer*, this Court's decision in *Moody v. Daggett*, 429 U.S. 78, 50 L.Ed.2d 236, 97 S.Ct. 274 (1976), is relevant to the issues raised in this case. In *Moody v. Daggett*, this Court held that a federal parolee imprisoned for a crime committed while on parole is not constitutionally entitled to a prompt parole revocation hearing when a parole violator warrant is issued and lodged with the institution in which he is confined but not executed and served on the inmate. At 50 L.Ed.2d 242,

the Court notes that issuance of the warrant is not revocation of the parole but that three options for disposition exist: (1) revoke parole after a hearing or (2) dismiss the warrant prior to hearing or (3) refuse to revoke parole after a hearing. Prior to execution of the warrant, there is no,

“operative event triggering any loss of liberty attendant upon parole revocation. This is a functional distinction, for the loss of liberty as a parole violator does not occur until the parolee is taken into custody under the warrant.” *Moody v. Daggett*, supra, 50 L.Ed. 2d, at 244.

Oklahoma submits that the status of an inmate prior to a decision to grant clemency is identical to that of an inmate against whom a warrant has been lodged but not executed. Each has only the expectation of action which will affect his status of incarceration. In neither case is a liberty interest implicated.

“With only a prospect of future incarceration which is far from certain, we cannot say that the parole violator warrant has any present or inevitable effect upon the liberty interests which Morrissey sought to protect.” *Moody v. Daggett*, supra, 50 L.Ed.2d, at 244.

This Court also shed light on the nature of a “liberty interest” in *Meachum v. Fano*, 427 U.S. 215, 49 L.Ed.2d 451, 96 S.Ct. 2532 (1976), and *Montayne v. Haymes*, 427 U.S. 236, 49 L.Ed.2d 466, 96 S.Ct. 2543 (1976). In both cases the Court dealt with transfers of inmates between institutions within the state correctional system. At stake was the inmates’ interest in being held in a less restrictive form of custody. The issue before the Court was whether

or not this constituted a “liberty interest” protected by the Fourteenth Amendment. This Court held in *Meachum v. Fano*:

“... we cannot agree that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. . . . But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. . . . The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another. The conviction has sufficiently extinguished the defendant’s liberty interest to empower the State to confine him in *any* of its prisons.

“Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State’s institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.” 427 U.S. 224-225.

There is no question but that a parolee enjoys more freedom than an inmate incarcerated in one of the state’s penal facilities. However, it is equally clear that a parolee

is in the custody of the state just as is an inmate incarcerated in a state penal facility. *Bricker v. Michigan Parole Board*, 405 F.Supp. 1340 (E.D. Mich. 1975); *Roach v. Board of Pardons and Paroles*, 503 F.2d 1367, 1368 (8th Cir. 1974). The only difference is the degree of custody involved. In Oklahoma, as in many states, the range of custody is from incarceration in the maximum security penitentiary to supervision while on parole. Though the range of custody is great, from very restricted to near freedom, this Court has held in *Meachum* and *Montayne* that the inmate has no "liberty interest" in serving his sentence under any particular degree of custody.

"The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in any of its prisons." 427 U.S. 224

And, Oklahoma would submit, the state is empowered to confine him for any period of time not to exceed the maximum lawful sentence under which he has been incarcerated. The analogy argued here by Oklahoma is supported in Footnote 8 of the Supreme Court's Opinion in *Meachum v. Fano*, supra.

In addition, it is clear that the *Meachum* and *Montayne* cases, supra, would apply to decisions involving the transfer of inmates to and from a community treatment work release center. Obviously, there is little difference between the liberty enjoyed by a parolee and that enjoyed by a resident of a community treatment center though the resident remains, technically, incarcerated. The significant difference is that the parolee enjoys a status protected by the Fourteenth Amendment which was created by state

statute and conferred on him by appropriate state parole authorities. It is clear that under *Meachum* and *Montayne* the community treatment center resident enjoys no such status.

However, it is argued that because the decision to grant parole shortens the period of incarceration that decision should also be protected by due process. Applying this reasoning to the above analogy a state would be required to comply with the Due Process Clause when deciding not to send a lawfully convicted inmate to a community treatment center as well as when deciding to send a community treatment center resident to another institution with a more restricted confinement.

It is interesting to apply this reasoning to another aspect of the criminal process. The decision to prosecute an alleged felon certainly affects that defendant's liberty and will likely result in his incarceration. However, it cannot be seriously argued that the prosecutor should comply with due process in deciding whether or not he will prosecute in a particular case. See, *Neuman v. United States*, 382 F.2d 479 (D.C. 1967).

CONCLUSION

Oklahoma contends that the interest of an inmate in release on parole does not constitute a liberty interest as that term is used in the Fourteenth Amendment. That provision provides that a state may not *deprive* an individual of liberty without providing due process. This case presents the opposite situation. When an inmate is first incarcerated, he has been deprived of all the liberty he will lose by

virtue of his conviction. However, nowhere in the Fourteenth Amendment is due process required when the state acts to give back a portion of that liberty of which the inmate has been lawfully deprived. Therefore, for the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

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November, 1978

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STATE OF OKLAHOMA
COUNTY OF OKLAHOMA

I JOHN F. FISCHER II, depose and say that I am an attorney in the office of Larry Derryberry, attorney of record for the State of Oklahoma, Amicus Curiae herein, and that on November _____, 1978, pursuant to Rule 33, of the Rules of the Supreme Court, I served three copies of the foregoing brief, by mailing the copies in a duly addressed envelope, with First Class postage prepaid, to each of the following named counsel of record:

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All parties required to be served have been served.

John F. Fischer II

Subscribed and sworn to before me on this _____
day of November, 1978.

Notary Public

My commission expires _____.